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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JOSE LUIS ORDAZ, Defendant and Appellant.	D072977 (Super. Ct. No. RIF1204423)

APPEAL from a judgment of the Superior Court of Riverside County, Patrick J. Magers, Judge. (Retired Judge of the Riverside Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed as modified.

Patricia A. Scott, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

A jury found Jose Luis Ordaz guilty of two counts of aggravated sexual assault of a child under 14 (Pen. Code, § 269, subd. (a)(5);[1] counts 1, 2), five counts of forcible lewd act with a child under age 14 (§ 288, subd. (b)(1); counts 4, 5, and 7–9), two counts of felony sexual battery (§ 243.4, subd. (a); counts 10, 11), and one count of lewd act with a child under 14 (§ 288, subd. (a)) a lesser included offense of count 6.[2] The jury also found true an allegation that Ordaz committed the offenses alleged in counts 1 through 9 against more than one victim, within the meaning of section 667.61, subdivision (e)(4).[3] The trial court sentenced Ordaz to an aggregate prison sentence of 125 years to life, consisting of eight consecutive terms of 15 years to life on counts 1, 2, and 4 through 9, a consecutive four-year term on count 10, and a consecutive one-year term on count 11.

On appeal, Ordaz claims that the record does not contain substantial evidence of force, duress, menace, or fear of immediate bodily injury to support the jury's verdict

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1 Unless otherwise specified, all subsequent statutory references are to the Penal Code.

2 The jury found Ordaz not guilty of one count of aggravated sexual assault of a child under 14 (§ 269, subd. (a)(5); count 3) and not guilty of the uncharged lesser included offense of simple battery with respect to that count. With respect to count 6, the jury found Ordaz not guilty of the charged offense of forcible lewd act with a child under age 14 (§ 288, subd. (b)(1)).

3 Counts 1 through 6 pertained to victim Jane Doe 1, and counts 7 through 11 pertained to victim Jane Doe 2.

with respect to count 2. We conclude that there is substantial evidence to support the jury's verdict. Ordaz also claims that the trial court erred in imposing a court operations fee of $440 and a criminal conviction assessment fee of $330, and that the fees should be modified to $400 and $300 respectively. The People concede this error and we accept the People's concession. Finally, in a supplemental brief, Ordaz claims the trial court erred in imposing the court operations fee, the criminal conviction assessment fee, and a $10,000 restitution fine without first determining his ability to pay these charges. We conclude that Ordaz has not established that the trial court erred in imposing them.

Accordingly, we modify the judgment to impose a court operations fee of $400 and a criminal conviction assessment fee of $300. As so modified, the judgment is affirmed.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The People's evidence*

1. *Sexual offenses committed against Jane Doe 1*

Ordaz is Jane Doe 1's grandfather. When Jane Doe 1 was about four years old, her parents divorced. After her parents separated, Jane Doe 1, together with her mother and her two older siblings, including victim Jane Doe 2, moved into an apartment in San Diego with her grandparents. For a period of time, Jane Doe 1 also lived with her siblings in her grandparents' home in Moreno Valley without their mother. Sometime prior to the fourth grade, Jane Doe 1 moved into an apartment with her mother and her

siblings. The apartment was located about 15 minutes from Ordaz's Moreno Valley residence. Jane Doe 1 often visited her grandparents' home.

Beginning in approximately fourth or fifth grade, Ordaz began touching Jane Doe 1's breasts over her clothes. During fifth and sixth grade, Ordaz began to touch Jane Doe 1's breasts under her clothes. Ordaz committed these molestations in various rooms of his residence, often when other family members were present elsewhere in the home.

On one occasion, as described in detail in part III.A.3, *post*, when Jane Doe 1 was in sixth grade, Ordaz forced Jane Doe 1 to touch his penis over his clothes.

Ordaz also touched Jane Doe 1's vagina on several occasions. As described in detail in part III.A.2, *post*,[4] Ordaz put his fingers in Jane Doe 1's vagina during an incident in her grandparents' bathroom that occurred when Jane Doe 1 was 13 years old. Another time, also when Jane Doe 1 was 13 years old, Jane Doe 1 and Ordaz were alone in the living room of her residence. Ordaz approached Jane Doe 1 and rubbed her vagina outside of her clothes. Shortly thereafter, Ordaz put his fingers inside the lips of her vagina. Jane Doe 1 asked Ordaz to stop, but he continued. Ordaz used one of his hands to hold Jane Doe 1 in place while he continued the molestation. Eventually, Jane Doe 1 was able to free herself and get away.

2. *Sexual offenses committed against Jane Doe 2*

Jane Doe 2 is five years older than Jane Doe 1. Ordaz touched Jane Doe 2's vagina on numerous occasions, beginning when she was in the fourth grade. Ordaz also

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4 As explained in part III.A, *post*, this incident formed the basis of count 2, which Ordaz challenges on appeal.

touched Jane Doe 2's breasts. In addition, Ordaz made Jane Doe 2 touch his penis over his clothing. He also kissed her on the mouth. On other occasions, Ordaz exposed his penis and testicles to Jane Doe 2 and rubbed himself after getting her attention.

3. *Disclosures of the abuse*

In November 2012, when Jane Doe 1 was 13 years old, Jane Doe 1 used another family member's identity to open a Facebook account in order to communicate with a boy at school. After Jane Doe 1's parents discovered what she had done, they punished her in various ways. Among the punishments was that Jane Doe 1 had to go her grandparents' house every day after school rather than remain at home unsupervised. The day after getting in trouble, Jane Doe 1 went to her grandparents' house and Ordaz touched her inappropriately. During the incident, Jane Doe 1 repeatedly kicked and pushed Ordaz in an attempt to get him to stop the molestation.

Within days of this molestation, Jane Doe 1 spoke to her father on the telephone and told him that Ordaz had been touching her inappropriately. Jane Doe 1's father telephoned Jane Doe 2 and asked whether Ordaz had abused her. Jane Doe 2 denied having suffered any such abuse. However, shortly thereafter, Jane Doe 2 spoke in person with her father and told him that Ordaz had in fact molested her. Jane Doe 1 and Jane Doe 2 both told the police about the molestations.

B. *Defense evidence*

Ordaz testified that he had never touched Jane Doe 1 or Jane Doe 2 in an inappropriate manner. Several family members testified that they had not witnessed

anything that would cause them to suspect that Ordaz was abusing either Jane Doe 2 or Jane Doe 1.

III.

DISCUSSION

A. *There is substantial evidence in the record to support the jury's verdict finding Ordaz guilty of aggravated sexual assault of a child under 14 (§ 269, subd. (a)(5)) in count 2*

Ordaz claims that the record does not contain substantial evidence of force, duress, menace, or fear of immediate bodily injury as is required to support the jury's guilty verdict on count 2 for aggravated sexual assault of a child under 14 (§ 269, subd. (a)(5)) in count 2.

1. *Governing law*

a. *The law governing sufficiency claims*

"In reviewing a sufficiency of evidence claim, the reviewing court's role is a limited one. ' "The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]" ' [Citations.] [¶] ' "Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial

evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder." ' " (*People v. Smith* (2005) 37 Cal.4th 733, 738–739.)

b. *Applicable substantive law*

i. *Relevant statutes*

The jury found Ordaz guilty of aggravated sexual assault of a child under 14 (§ 269, subd. (a)(5)). Section 269 provides in relevant part:

> "(a) Any person who commits any of the following acts upon a child who is under 14 years of age and seven or more years younger than the person is guilty of aggravated sexual assault of a child:
> [¶] . . . [¶]
>
> "(5) Sexual penetration, in violation of subdivision (a) of Section 289."

Section 289, subdivision (a) in turn provides in relevant part:

> "[(a)(1)] (B) Any person who commits an act of sexual penetration upon a child who is under 14 years of age, when the act is accomplished against the victim's will by means of force, violence, *duress*, menace, or fear of immediate and unlawful bodily injury on the victim or another person, shall be punished . . . ." (Italics added.)[5]

ii. *The meaning of "duress" for purposes of child sexual abuse statutes*

Duress, in the context of aggravated sexual assault against a child, is broadly defined as " 'a direct or implied threat of force, violence, danger, hardship or retribution

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5 The People concede in their brief that Ordaz "did not use force during the time he committed count [2]," but argue that there is substantial evidence that Ordaz committed count 2 by means of duress. Accordingly, we consider whether there is substantial evidence that he committed sexual penetration by means of duress.

sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted.' " (*People v. Cochran* (2002) 103 Cal.App.4th 8, 13 (*Cochran*) [defining duress as applicable to violations of aggravated sexual assault on a child (§ 269, subd. (a))]; see also *People v. Senior* (1992) 3 Cal.App.4th 765, 774–775 (*Senior*) [defining duress with respect to forcible sexual penetration (§ 289, subd. (a))].)[6]

Duress, by its nature, "involves psychological coercion" of the victim. (*Senior*, *supra*, 3 Cal.App.4th at p. 775; *Cochran*, *supra*, 103 Cal.App.4th at p. 15.) Duress "can arise from various circumstances, including the relationship between the defendant and the victim and their relative ages and sizes." (*Senior*, at p. 775.) " 'Where the defendant is a family member and the victim is young, . . . the position of dominance and authority of the defendant and his continuous exploitation of the victim' is relevant to the existence of duress." (*Ibid.*, quoting *People v. Superior Court* (*Kneip*) (1990) 219 Cal.App.3d 235, 239.)

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6 The definition of duress applicable to sexual offenses committed against a child is broader than the definition that applies when duress is used as a defense to a criminal charge (see *People v. Pitmon* (1985) 170 Cal.App.3d 38, 51 [discussing the distinction between duress as a defense to a criminal charge and duress as an element of commission of a lewd act on a child (§ 288, subd. (b)]) or the definition applicable to other sexual offenses. (See *People v. Leal* (2004) 33 Cal.4th 999, 1008 ["The Legislature may have wished to protect children against lewd acts committed by threats of hardship despite its determination that similar threats of hardship should not provide the basis for the crime of rape or spousal rape against an adult"].) The broad definition of duress applies with respect to both committing a lewd act on a child (§ 288, subd. (b)(1)) (see *Leal*, at pp. 1004–1009) and aggravated sexual assault of a child (§ 269, subd. (a)) (see *Cochran*, *supra*, 103 Cal.App.4th at p. 13 [applying *Pitmon* court's definition of duress]).

Courts consider the "totality of the circumstances" in determining whether a defendant committed sexual abuse against a child by means of duress. (*People v. Thomas* (2017) 15 Cal.App.5th 1063, 1072 (*Thomas*).) Relevant circumstances "include[] the victim's age, her relationship to the perpetrator, threats to harm the victim, physically controlling the victim when the victim attempts to resist, warnings to the victim that revealing the molestation would result in jeopardizing the family, and the relative physical vulnerability of the child." (*Ibid.*)

2. *The incident giving rise to count 2*

The offense charged in count 2 occurred when Jane Doe 1 was 13 years old. Jane Doe 1 was in her grandparents' home, washing her hands in the bathroom connected to her grandparents' bedroom. Ordaz came into the bathroom and stood behind Jane Doe 1. He began rubbing Jane Doe 1's vagina over her clothes and then unzipped her pants. Jane Doe 1 stated that she "didn't do anything" in response. Jane Doe 1 explained that, at the time, she was afraid that "maybe one day it would lead to more than just touching." Ordaz used his fingers to penetrate her vaginal lips for four to five minutes. Jane Doe 1 could not recall what made the incident stop. Three other grandchildren were in the house, along with Jane Doe 1's grandmother, who was in the kitchen.

3. *Application*

In evaluating whether there is substantial evidence from which the jury could find that Ordaz accomplished count 2 by means of duress, we consider first the nature of Ordaz's relationship with Jane Doe 1. Jane Doe 1 testified that Ordaz was "like dad to everyone," and that her biological father "wasn't really around." Jane Doe 1 explained

that Ordaz was the family's "number one support," and that "everyone went to him . . . [and] they needed him." Ordaz provided financial support to Jane Doe 1 and to her family. As noted in part II, *ante*, Jane Doe 1 had previously lived in Ordaz's residence. Even after Jane Doe 1 moved out with her mother and siblings, Jane Doe 1 frequently visited Ordaz's residence, particularly after school. Jane Doe 1 was also relatively young when the molestations began. She testified that Ordaz began to molest her when she was in the fourth or fifth grade. In addition, Jane Doe 1 testified that the abuse occurred frequently over a period of years.[7]

There was thus evidence from which a jury could reasonably find that Ordaz and Jane Doe 1 shared a close familial relationship in which he exercised a position of authority and dominance, and also that Ordaz continually molested Jane Doe 1 while she was a young child. This evidence supports the jury's implied finding of duress. (See *Senior, supra,* 3 Cal.App.4th at p. 775 [" 'Where the defendant is a family member and the victim is young, . . . the position of dominance and authority of the defendant and his continuous exploitation of the victim' is relevant to the existence of duress"]; accord *Thomas, supra,* 15 Cal.App.5th at p. 1072 [victim's age and relationship to the perpetrator are among the "totality of circumstances" relevant in determining whether there is substantial evidence of duress to support child sexual abuse conviction]). For example, in *People v. Sanchez* (1989) 208 Cal.App.3d 721, 747–748, the Court of Appeal concluded that the record contained substantial evidence of duress where the defendant

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7 Jane Doe 1 testified that Ordaz had touched her inappropriately "more than 30 times."

molested his granddaughter repeatedly over a three-year period, beginning when she was eight. In reaching this conclusion, the *Sanchez* court relied in part on evidence that the defendant grandfather occupied the "status as a father figure in [victim's] mind." (*Id.* at p. 748.)

There also was evidence that, by the time Ordaz committed count 2, he had used force on at least one prior occasion in molesting Jane Doe 1. Jane Doe 1 testified that, on one occasion when she was in the sixth grade,[8] Ordaz called her into the living room and that the following occurred:

> "I sat down on the chair with him, and I didn't think he would do anything with my nana in the room next to us. I sat down in the chair with him, and he started rubbing my breasts over the clothes, and then grabbed my hands, and he, like, forcibly pushed my hands to touch his penis over his clothes."

Jane Doe 1 explained that during this incident, "I tried to move my hand," but that Ordaz "held me tight." Jane Doe 1 stated that Ordaz was "forcing me to rub his penis." When she "tried to get up," Ordaz "pulled [her] closer." Jane Doe 1 estimated that this incident lasted approximately three minutes before she was able to use her other hand to push Ordaz's hand off of her. Evidence that Ordaz had used physical force to overcome Jane Doe 1's efforts to resist a prior assault supports the jury's implicit finding that Ordaz accomplished count 2 by means of duress. (See *Thomas*, *supra*, 15 Cal.App.5th at p. 1072 [efforts by the defendant in "physically controlling the victim when the victim

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8 Jane Doe 1 testified that she was less than 12 years old during the summer before sixth grade, and that she was 13 years old when Ordaz committed count 2. From this evidence, the jury could reasonably find that the sixth-grade incident occurred before Ordaz's commission of count 2.

attempts to resist," relevant in determining duress]; *Senior, supra,* 3 Cal.App.4th at p. 775 [defendant's pulling the victim back and physically controlling her when she attempted, albeit ineffectually, to pull away suggested that greater physical resistance would be answered with greater physical force].)

Jane Doe 1 also testified that she did not tell any other family members about the sexual abuse due to various psychological pressures. For example, while discussing when asked why she didn't scream during one of the sexual assaults, the following colloquy occurred:

> "[Jane Doe 1]: Because I didn't—I didn't want people to know that he was doing this.
>
> "[Prosecutor]: Even if it meant that it would stop?
>
> "[Jane Doe 1]: Yeah.
>
> "[Prosecutor]: Why?
>
> "[Jane Doe 1]: Because I didn't—my nana was close to him. And I didn't want, like—I didn't want anything to change. I didn't want them to view him differently. I told myself to put up with it because I don't want a change in the family, and I didn't tell or scream."

Evidence that Ordaz molested Jane Doe 1 repeatedly in the family home for years beginning when she was a young child, that he had used force to overcome her resistance to his molestations, and that Jane Doe 1 did not report the molestations due to concerns about the damage such revelations would cause to the family support the conclusion that a reasonable jury could find that Ordaz committed count 2 by means of duress.

Ordaz's arguments to the contrary are not persuasive. Ordaz argues that the record lacks certain forms of evidence that have been found to support a finding of duress in

other cases, such as ongoing violent conduct by the defendant (*Thomas, supra,* 15 Cal.App.5th at p. 1073), or statements by the defendant to the victim not to reveal the molestations (*Cochran, supra* 103 Cal.App.4th at p. 15). The Supreme Court has cautioned against such an approach to evaluating sufficiency claims. (See *People v. Story* (2009) 45 Cal.4th 1282, 1299 ["The Court of Appeal erred in focusing on evidence that did not exist rather than on the evidence that did exist"].) That the record does not contain the same types of evidence of duress found in *other* cases does not establish that the evidence of duress that is in the record in *this* case is insufficient.

Ordaz also relies on *People v. Espinoza* (2002) 95 Cal.App.4th 1287 (*Espinoza*) in which the Court of Appeal concluded that there was insufficient evidence that the defendant's sexual assaults of his 12-year-old daughter were committed by means of duress. (*Id.* at p. 1320.) Central to the *Espinoza*'s court's conclusion was its assessment that " ' "Psychological coercion" without more does not establish duress.' " (*Espinoza*, at p. 1321, quoting *People v. Hecker* (1990) 219 Cal.App.3d 1238, 1250–1251.) As this court explained in *Cochran* in disagreeing with *Hecker*, "The very nature of duress is psychological coercion." (*Cochran*, *supra*, 103 Cal.App.4th at p. 15; *id.* at pp. 14, 15 [stating that language in *Hecker* stating that " ' "[p]sychological coercion" without more does not establish duress,' " was "overly broad"], quoting *Hecker*, at p. 1250.) We agree with the *Cochran* court.

The *Espinoza* court also relied in part on evidence that the victim "offered no resistance." (*Espinoza, supra,* 95 Cal.App.4th at p. 1320.) To begin with, the Supreme Court has explained why children commonly do not resist sexual abuse. "When the

victim is a child, for example, the child may be too surprised, shocked, or intimidated by the defendant to offer much, if any, resistance. (See *People v. Soto* (2011) 51 Cal.4th 229, 243 [children are uniquely susceptible to abuse because of their dependence upon adults, their smaller size, and relative naiveté].)" (*People v. Westerfield* (2019) 6 Cal.5th 632, 720–721.) Moreover, in this case, the record contains evidence that Jane Doe 1 *did* resist Ordaz's sexual assaults, both before the commission of count 2 (as recounted *ante* in the incident in which Ordaz forcibly had Jane Doe 1 touch his penis over his clothes) as well as after.[9] In short, *Espinoza* does not establish that the record in this case lacks substantial evidence of duress.

Finally, Ordaz asserts that "there was no evidence that [he] created any psychological pressure on [Jane Doe 1] to submit to his sexual conduct." We disagree. A reasonable jury could conclude that the evidence recounted above supports the conclusion that Ordaz created psychological pressure upon Jane Doe 1 that resulted in her acquiescing in the sexual molestations.

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9 Jane Doe 1 described the final sexual assault that Ordaz committed on her before she disclosed the abuse in relevant part as follows:

> "I was watching TV on the bed, and I was in the room alone. . . . [H]e walked in and he laid with me on the bed, and he, like, tried to get closer to me, and I kind of like kicked him away with my foot. And he just—he didn't care, and he started touching my breasts and came closer to me, but I remember kicking him—I wouldn't scream. I would never scream."

Jane Doe 1 also stated that during this incident she "told him to stop," and that she "pushed him off the bed." Jane Doe 1 added that she pushed him during the incident "[a]bout five times."

Accordingly, we conclude that that there is substantial evidence of duress to support the jury's guilty verdict on count 2.

B. *The amounts of the court operations and criminal conviction assessment fees must be modified*

Ordaz claims that the trial court erred in imposing a $440 court operations fee and a $330 criminal conviction assessment fee. He notes that Penal Code section 1465.8 requires the imposition of a court operations fee of $40 per conviction and that Government Code section 70373 mandates the imposition of a $30 criminal conviction assessment fee per conviction. Ordaz argues that since he suffered 10 convictions, the court should have imposed a $400 court operations fee (rather than $440) and a $300 criminal conviction assessment fee (rather than $330). The People concede these errors. We accept the People's concession and modify the judgment accordingly.

C. *Ordaz has not established that the trial court erred in imposing the court operations and criminal conviction fees and a $10,000 restitution fine without determining his ability to pay such charges*

In a supplemental brief, Ordaz challenges the trial court's imposition of $400 in court operations fees (Pen. Code, § 1465.8), $300 in court facilities fees (Gov. Code, § 70373),[10] and a $10,000 restitution fine (Pen. Code, § 1202.4, subd. (b)), as violating his right to due process because the trial court made no finding of his ability to pay such charges. (Citing *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*); see *id.* at p.

10 As noted in part III.B, *ante*, the trial court actually imposed $440 in court operations fees and $330 in court facilities fees. However, the People concede that the court should have imposed a $400 court operations fee (rather than $440) and a $300 criminal conviction assessment fee (rather than $330).

1160 ["Because the only reason Dueñas cannot pay the [restitution] fine and [court facilities and court operations] fees is her poverty, using the criminal process to collect a fine she cannot pay is unconstitutional"].)

Ordinarily, a defendant who fails to object to the imposition of a fee or fine in the trial court may not raise a claim pertaining to that charge on appeal. (See, e.g., *People v. Aguilar* (2015) 60 Cal.4th 862, 864 [appellate forfeiture rule applies to probation fines and attorney fees imposed at sentencing]; *People v. McCullough* (2013) 56 Cal.4th 589, 596–598 [defendant forfeits appellate challenge to the sufficiency of evidence supporting a Gov. Code, § 29550.2, subd. (a) booking fee if objection not made in the trial court]; *People v. Avila* (2009) 46 Cal.4th 680, 729 [forfeiture rule applies to defendant's claim that restitution fine amounted to an unauthorized sentence based on his inability to pay]; *People v. Nelson* (2011) 51 Cal.4th 198, 227 (*Nelson*) [claim that trial court erroneously failed to consider ability to pay a restitution fine forfeited by the failure to object].)

Ordaz acknowledges that he did not object to the imposition of the fees or fine in the trial court. Nevertheless, Ordaz argues that he "has not forfeited his claim because (1) he claims the trial court made a legal error at sentencing, not a discretionary error, and (2) it would have been futile to object before the trial court."

With respect to the former contention, Ordaz argues "that the fines could not legally be imposed on an indigent defendant without first determining his ability to pay." Even assuming that this contention is not forfeited, it is without merit. The trial court was not required to consider sua sponte Ordaz's ability to pay prior to imposing the fees

and fines. (See *People v. Castellano* (2019) 33 Cal.App.5th 485 (*Castellano*).) The *Castellano* court explained:

> "Castellano asserts the court facilities and operations assessments and the criminal laboratory analysis fee should be reversed, and execution of the restitution fine stayed, unless and until the People prove he has the present ability to pay the fine. *Dueñas* does not support that conclusion *in the absence of evidence in the record of a defendant's inability to pay*. . . . [¶] Consistent with *Dueñas*, *a defendant must in the first instance contest in the trial court his or her ability to pay the fines*, fees and assessments to be imposed and at a hearing present evidence of his or her inability to pay the amounts contemplated by the trial court." (*Id.* at pp. 489-490, italics added.)[11]

We agree with the *Castellano* court that a trial court must consider whether a defendant has the ability to pay a court facilities fee, a court operations fee, and a restitution fine only when the defendant raises the issue. Thus, the trial court was not required to consider the issue of Ordaz's ability to pay the fees and fines sua sponte before imposing them.

With respect to Ordaz's contention that it would have been futile to object to the imposition of the charges in the trial court, Ordaz argues that case law supports the conclusion that a "[a] failure to object is ' "excusable" ' when ' "governing law at the time . . . afforded scant grounds for objection." ' " He further argues that, at the time of sentencing in this case, the "governing law on assessments and restitution fines offered

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11 *Castellano* and *Dueñas* were both decided by the Court of Appeal, Second Appellate District, Division Seven. (*Castellano, supra,* 33 Cal.App.5th 485; *Dueñas, supra,* 30 Cal.App.5th 1157.)

scant grounds for objecting to their imposition" and that *Dueñas* "represents a dramatic and unforseen change in the law."

We acknowledge the split of authority with respect to how unforeseen *Dueñas* may be said to have been, and whether the novelty of that decision may serve as the basis for excusing a defendant's failure to object in *any* case. (Compare *Castellano, supra*, 33 Cal.App.5th at p. 489 [*Dueñas* was "a newly announced constitutional principle that could not reasonably have been anticipated at the time of trial" and declining to apply the forfeiture doctrine to defendant's challenge to assessments and restitution fine] with *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1154 [concluding that defendant forfeited challenge to assessments and restitution fine and stating "we disagree . . . [that] *Dueñas* as 'a dramatic and unforeseen change in the law' "].)

However, in *this* case, irrespective of the novelty of the principles announced in *Dueñas*, it cannot be said that there were "scant grounds for object[ing]," to the trial court's imposition of the $10,000 restitution fine. On the contrary, at the time of sentencing, well established statutory law specifically authorized a trial court to consider a defendant's "inability to pay" any restitution fine above the statutory minimum. (See § 1202.4, subd. (d).) Section 1202.4, subdivision (d) provides in relevant part:

> "In setting the amount of the fine pursuant to subdivision (b) in excess of the minimum fine pursuant to paragraph (1) of subdivision (b), the court shall consider any relevant factors, including, but not limited to, the *defendant's inability to pay* . . . . Consideration of a defendant's inability to pay may include his or her future earning capacity. A defendant shall bear the burden of demonstrating his or her inability to pay. Express findings by the court as to the factors bearing on the amount of the fine shall not be required. A separate hearing for the fine shall not be required."

Thus, if Ordaz had believed that the trial court failed to give adequate consideration to his ability to pay the $10,000 restitution fine, it was incumbent on him to raise this objection at the sentencing hearing.[12] His failure to do so resulted in a forfeiture of his challenge to the trial court's imposition of the restitution fine. (*Nelson*, *supra*, 51 Cal.4th at p. 227.) Further, since Ordaz raised no objection to the imposition of a *$10,000* restitution fine on the ground that he lacked an ability to pay such a fine, notwithstanding clearly established statutory authorization for raising such a challenge (§ 1202.4, subd. (d)), we see no basis for excusing his failure to object to assessments totaling approximately *$700* on the basis that he is unable to pay those assessments. (See *People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1033 [employing similar reasoning].)

Accordingly, we conclude that Ordaz has not established that the trial court erred in imposing the court operations and criminal conviction fees and a $10,000 restitution fine without determining his ability to pay them.

IV.

DISPOSITION

The judgment is modified to impose a court operations fee of $400 rather than $440 and a criminal conviction assessment fee of $300 rather than $330. As so modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of

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12 We note that the probation department recommended that the trial court impose the maximum statutory fine of $ 10,000, and the trial court adopted this recommendation without objection.

judgment and forward a certified copy to the Department of Corrections and Rehabilitation.

AARON, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.